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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-1195

AMERICAN PIPE AND CONSTRUCTION CO., SMITH-SCOTT CO., INC., UNITED CONCRETE PIPE COMPANY, KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U.S. INDUSTRIES, INC., UTAH CONCRETE PIPE COMPANY, W. R. WHITE COMPANY, all corporations,

Petitioners,

vs.

STATE OF UTAH, a body politic, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF.

Statement of the Case.

The statement of the case is set forth at length in the Brief for Petitioners, pages 3 through 11. In response thereto in their opening brief, Respondents predicate their position upon the following propositions:

1. Respondents were before the court when the abortive class action was filed by Utah (Brief for Respondents, pp. 15 and 17) and therefore their respective causes of action were not barred by the statute of limitations.

2. The barring provisions of Section 5(b) of the Clayton Act are modified by Rule 23, F.R.Civ.P. (p. 12, *et seq.*).

3. The District Court precluded Respondents from timely intervention (Brief for Respondents, p. 20).

4. The decision of the District Court was not predicated upon an exercise of discretion within the meaning of Rule 24(b), F.R.Civ.P. (Brief for Respondents, p. 29).

Petitioners submit that the foregoing propositions are demonstrably erroneous for the reasons hereinafter set forth.

ARGUMENT.

I.

Respondents Were Not Before the Court When the Utah Action Was Filed.

The Brief for Respondents states the controlling question herein as follows (Brief for Respondents at p. 11):

> "The question before the Court is whether intervenors who are members of an abortive class are entitled to the benefits of the date of the commencement of a Sherman Act § 1 class action for purposes of the statute of limitations. It is a question of first impression involving the relationship between § 5(b) of the Clayton Act and Rule 23 of the Federal Rules of Civil Procedure. Specifically the court must decide whether an action is 'commenced' within the meaning of § 5(b) as to absentee plaintiffs when a class action complaint is filed timely but denied class action status by the trial court after the limitations period has run."

The foregoing correctly states one of the paramount issues herein. Respondents purport to resolve the foregoing issue with the following statement (Brief for Respondents at p. 9):

> "The commencement of the Sherman Act § 1 class action halts the running of the statute of limitations as against all members of the alleged class. If it is subsequently determined by a court that the case cannot be maintained as a class action pursuant to Rule 23, the purported members should be granted reasonable time within which to intervene."

Respondents' conclusion is not supported by Rule 23, F.R.Civ.P., which specifies certain prerequisites to a class action which Judge Pence found to be lacking.[1]

Respondents' contentions are predicated upon the contradictory premise inherent therein which was adopted by the Court of Appeals, *i.e.*, that even though the statutory prerequisites to a class action are not met, the claims of parties who are not authorized to be before the court pursuant to Rule 23 were, in fact, before such court pursuant to such rule.[2] Rule 23 does not provide that absent parties are before the court when the prerequisites to a class action are not met. It follows that Respondents' contention is contrary to a well-settled principle that the legal consequences flowing from a proposed class action "must be found within the four corners of amended Rule 23 * * *."[3]

Respondents' argument that they were before the court by reason of the filing of an invalid class action is based upon the following reasoning:

> "The respondents, as members of an abortive class, are in a position similar to absentee plaintiffs who sought to intervene in spurious class

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[1]A. 344-45; R. 346-47. A. 353; R. 356. Respondents' contention (Brief for Respondents, p. 17) that "the class action did exist" is anomalous and constitutes an obvious collateral attack on the finding of the trial court contrary thereto. The order of the District Court respecting the class action is not the subject of this appeal.

[2]The cases relied upon by Respondents are cases in which class actions were found to be proper. *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961); *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968); *accord, State of Minnesota v. United States Steel Corporation*, 44 F.R.D. 559 (D. Minn. 1968); and *York v. Guaranty Trust Co. of New York*, 143 F.2d 503, 529 (2d Cir. 1944).

[3]*Eisen v. Carlisle* (2d Cir. Op. May 1, 1973) ATRR No. 612, May 8, 1973 at F-1, F-4.

actions under old Rule 23. Such a proceeding was really not a class action at all. The decree in a spurious class action was not binding on the entire class, but merely a procedural device, an invitation for permissive joinder. If the filing of a spurious class action under old Rule 23 'commenced' an action as to the unnamed and absent plaintiffs within the meaning of § 5(b), the filing of the class action complaint in the instant case under new Rule 23, which makes the judgment binding on all members, should certainly suffice." (Brief for Respondents, p. 15).

Such argument ignores the prerequisites to Rule 23, F.R.Civ.P., established by the 1966 amendment. Rule 23(a) now provides, in part, as follows:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all *only if* (1) the class is so numerous that joinder of all members is impractical * * *." (Emphasis added).

The addition of the word "only" in the 1966 amendment underscores the conclusion that the prerequisites to Rule 23 must be met before a class action has legal consequences; otherwise the word "only" would be without meaning.

Respondents' brief, page 23, summarizes the position of the Court of Appeals as follows:

"The Court of Appeals found no conflict between § 5(b) of the Clayton Act and Rule 23 since it held that the instant lawsuit 'was commenced by Utah eleven days before the running of the statute.' In other words, under the facts the action was "commenced' within the meaning of § 5(b), and the rights of the absentee plaintiffs were not barred by the statute of limitations."

The statement by the Court of Appeals that the action "was commenced by Utah eleven days before the running of the statute" and, therefore, was commenced within the meaning of 5(b), necessarily makes the assumption we have heretofore demonstrated to be erroneous, *i.e.*, that interveners and their separate causes of action were before the court by reason of an invalid class action.

Even where a true class action exists, the class is not an entity; it consists of separate persons with separate causes of action. The language of Rule 23(b)(1) clearly indicates that it is a procedural device for the prosecution of "separate actions." Upon the filing of Utah's complaint, only one party was actually before the court by virtue of having undertaken to assert its alleged claims—Utah. The Ninth Circuit chose to treat the would-be class members as if they had filed suit. Fictions aside, however, they had done nothing. They delayed filing their separate actions until a date more than five months after the statute of limitations had run.

In support of their position, Respondents quote *Leh v. General Petroleum Corp.*[4] in which the court cautioned against "a niggardly construction of the statutory language" of 5(b). Respondents call for "a liberal interpretation of 5(b)" and state (Brief for Respondents, p. 23):

> "Again, in *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, the Court observed that 'In 5(b) Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions.' "

[4]382 U.S. 54 (1965).

Respondents are seeking a liberal interpretation of the tolling provisions of 5(b) but seek to abrogate its barring provisions. Assuming *arguendo* that Respondents, as public bodies, are also private litigants, it goes without saying that in enacting Section 5(b), Congress meant to assist such litigants. Congressional intent is clearly controlling but the scope and extent of the assistance intended by Congress is clearly delineated by the requirement that a plaintiff "bring his action either (a) within the suspension period, *i.e.*, within 1 year after the Government suit had terminated, or (b) within 4 years after his cause of action had accrued."[5] The would-be interveners have failed to meet this test. Thus, the position of Respondents is in contradiction with the principles stated by this Court in *Holmberg v. Armbrecht*,[6]

> "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive."

It follows that neither valid nor invalid class actions filed pursuant to Rule 23, F.R.Civ.P., should have any

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[5]In H.R. Rep. No. 422, April 1955, 84th Cong. 1st Sess. 2 (1955), the following expression of such congressional intent appears:

> "While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of Government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts. It believes the provisions of this bill will tend to shorten the period over which private treble damage cases will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case has been concluded."

[6]327 U.S. 392, 395 (1946).

bearing upon the question as to whether Respondents have brought their separate actions within the time period delineated by Section 5(b) of the Clayton Act.

II.

The Barring Provisions of Section 5(b) of the Clayton Act Are Not Abrogated or Abridged by Rule 23, Federal Rules of Civil Procedure.

Despite their contention that Section 5(b) and Rule 23 are not in conflict, Respondents' brief impliedly concedes that the judgment of the Court of Appeals can be sustained only by the premise that the barring provisions of Section 5(b) of the Clayton Act are abridged by Rule 23, F.R.Civ.P. Thus, Respondents' brief states in part as follows (p. 12):

> "In order to reach a wise and just decision in the instant case, it is necessary to consider the facts carefully, and in light of the circumstances weigh competing principles in order to give effect to the broad policy considerations upon which they are based. On one hand we have a statute wherein Congress determined that whenever the running of the statute of limitations in any case such as this is suspended by prior governmental action, any action shall be barred unless commenced either within the period of suspension or within four years after the cause of action accrued. On the other hand we have Rule 23 of the Federal Rules of Civil Procedure, a rule designated to facilitate adjudication of numerous claims with judicial economy. It is then necessary to construe § 5(b) vis-a-vis Rule 23 in the light of the facts of this action."

The foregoing statement is followed by an extended discussion of the foregoing issue (Brief for Respondents, pp. 12-29). We have heretofore noted the statement (Brief for Respondents, p. 23) that Congress meant to assist private litigants in enacting 5(b) and that the congressional intent in enacting 5(b) must be considered (Brief for Respondents, pp. 24-27). Additionally, Respondents contend (Brief for Respondents, p. 27) that in resolving the apparent conflict between 5 (b) and Rule 23, the purposes and policy of Rule 23 must be considered.

The latter contention implies that a conflict exists between Rule 23, F.R.Civ.P., and Section 5(b) of the Clayton Act which must be resolved by a holding that Section 5(b) of the Clayton Act is somehow limited by Rule 23. If that is not Respondents' contention, the foregoing discussion by Respondents is irrelevant. Indeed, if the requirements of 5(b) have not been abrogated, it must necessarily follow that the judgment of the Court of Appeals must be reversed since admittedly Respondents have not brought their action within the suspension period designated by 5(b) by taking the minimal steps required by Rule 8, F.R.Civ.P. (see Brief for Petitioners, pp. 37-38). Indeed, the would-be interveners took no action whatsoever prior to the running of the statute of limitations.

As pointed out in Brief for Petitioners, page 23, the concept that 5(b) can be limited by Rule 23 is clearly contrary to the congressional intent. House Report Number 422 clearly states that under Section 5(b) a treble damage claimant "*would be required to bring his action either* (a) within the suspension period, *i.e.*, within 1 year after the Government suit had terminated,

or (b) within 4 years after his cause of action accrued." (Emphasis added).

Respondents' brief seeks to evade the well-established rule, which is discussed at length in Brief for Petitioners, that substantive rights cannot be abridged or enlarged by rules of procedure. In response thereto, Respondents imply that Section 5(b) does not establish any substantive right. They rely (Brief for Respondents, pp. 24-25) upon *Burnett v. New York Central Railroad Co.*[7] for the proposition: "the fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled. Thus the 'substantive—procedural' distinction would seem to be of little help in deciding questions of extending the limitation period." We agree completely with the *Burnett* decision, in which the petitioner's timely filing in the state court was held to have vindicated the congressional policy underlying the pertinent statute of limitations. This is in contrast to this case in which Petitioners filed no action whatsoever until after the period prescribed in the statute of limitations. In the *Burnett* decision, the Supreme Court held: "The basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one 'of legislative intent whether the right shall be enforceable . . . after the prescribed time.' "[8] Both the express terms of Section 5(b) and the plainly stated

[7]380 U.S. 424 (1965).
[8]*Id.* at 426.

congressional intent in House Report No. 422 leave no doubt that Congress did not wish private claimants to assert antitrust claims more than four years after their accrual or (when the suit is based upon a Government action) one year after the termination of such Government suit, whichever occurs later. The *Burnett* decision wholly undermines Respondents' contentions. This case is, therefore, within the elementary rule that only those statutes which are ambiguous or of doubtful meaning are subject to the detailed statutory analysis and interpretation urged in Respondents' brief.[9] Respondents' separate causes of action were not on file prior to December 12, 1969, a date more than five months after the termination of the foregoing suspension. Thus, the decision of the Ninth Circuit is in square contradiction to the foregoing statute of repose since it eliminates the requirement that the litigant "*bring his action either (a) within the suspension period, i.e.,* within 1 year after the Government suit had terminated or (b) within 4 years after his cause of action accrued."[10]

". . . [T]he right to bar an action for lapse of time is a substantive right."[11] Respondents' contention that

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[9]*Packard Motor Car Co. v. National Labor Relations Board,* 330 U.S. 485, 492 (1947).

[10]H.R.Rep. No. 422, April 1955, 84th Cong. 1st Sess. 2 (1955) (Emphasis added).

[11]The test of whether a statute of limitations is substantive in character is whether or not such statute does "significantly affect the result of a litigation * * *." *Guaranty Trust Co. v. York,* 326 U.S. 99, 109-10 (1945). Based upon this principle the Ninth Circuit has held that "* * * the right to bar an action for lapse of time is a substantive right." *John E. King v. Alaska Steamship Company,* 431 F.2d 994, 996 (9th Cir. 1970). The

(This footnote is continued on next page)

the barring provisions of 5(b) are abrogated by Rule 23, F.R.Civ.P. is contrary to the Enabling Act authorizing the Supreme Court to promulgate the Federal Rules (28 U.S.C. 2072) which expressly prohibited the Court from promulgating rules which "abridge, enlarge or modify any substantive right." Such contention is also contrary to the hornbook principle that court rules are subject to pertinent congressional statute.[12] The applicable doctrine is well stated in *Philadelphia Electric Company v. Anaconda American Brass Company*:[13]

> "Surely it was not the intention of the Committee, the Supreme Court, or the Congress that the 1966 amendments to Rule 23 should have any effect upon the period of limitations established by Congress, 15 U.S.C. §§ 15b, 16(b), as amended. Any such purpose would run counter to the statutory prohibition against rules which 'abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072."

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suggestion (Brief for Respondents, p. 26) that Section 5(b) is a mere procedural statute is based upon a statement by a member of the House Judiciary Committee that the statute "is simply a procedural change and suggested with the thought of setting up a uniform statute of limitations." It is obvious that Rep. Quigley's statement was directed to the uniform provisions of the act and not the barring provisions. To the extent such remarks are inconsistent with the clearly expressed legislative intent reflected in H.R. Rep. No. 422, April 1955, 84th Cong., 1st Sess. 2 (1955), the latter is controlling. *Binns v. United States*, 194 U.S. 486 (1903); *Lapina v. Williams*, 232 U.S. 78, 90 (1913); *cf. McLean v. United States*, 226 U.S. 374 (1912); *Wright v. Mountain Trust Bank*, 300 U.S. 440 (1936).

[12]*Palermo v. United States*, 360 U.S. 343 (1959); *Ex parte The City Bank of New Orleans*, 44 U.S. 292 (1845); *cf. Funk v. United States*, 290 U.S. 371 (1933), and *Gordon v. United States*, 344 U.S. 414 (1952).

[13]43 F.R.D. 452, 460 (E.D. Pa. 1968).

III.

The District Court Did Not Preclude Respondents From Timely Intervention.

The following statement is made in Brief for Respondents (p. 20):

> "The trial court then determined that the action could not be maintained as a class action since the court, as a matter of judicial administration, preferred to handle the claims through joinder of any additional claims. Consistent with these findings, the trial court could not deny the motions to intervene, which it had in fact invited, on grounds that permissive intervention would unduly delay the adjudication of the rights of the original parties."

Contrary to the foregoing contention, the trial court pointed out that Respondents' counsel had been studying its proposed cause of action for six months prior to the filing of the Utah Complaint and was charged with knowledge of the attendant problems concerning a further class action when use of this procedural device had been exhausted by several prior class actions. The opinion of the trial court respecting a class action did not constitute an invitation to intervene after the statute of limitations had run; the court merely designated the procedures which Respondents should have followed had they elected to take timely action. As stated by the trial court:

> "* * * It should have been unquestioned on the part of the plaintiffs' attorneys that individual action by affected parties, particularly the states, large cities and other large public entities in the Western Area, should have been taken long before

any class action was belatedly filed in this case, if in fact any of them believed the alleged conspiracy had injured them."[14] (See Brief for Petitioners, pp. 39-43).

Thus, Respondents are in an inescapable dilemma with respect to the issue of timeliness. If, as they contend, they were represented by the State of Utah when the action was filed, they are charged with Utah's knowledge that the class action device had been exhausted by the group of prior class actions in which they were invited to join and with such knowledge, refrained from requesting intervention until a date more than five months after the statute of limitations ran. If they are not represented by Utah they are in the same category as any other litigant who failed to file suit in a timely manner.

IV.

The Decision Below Reversing a Discretionary Ruling of the District Court Was Not Based on a Showing of Abuse of Discretion and Is, Therefore, in Conflict With the Decisions of This Court and With Other Circuits as Well as the Plain Language of Rule 24(b), Federal Rules of Civil Procedure.

Respondents have not controverted the numerous factors considered by the trial court in exercising its discretion. Such factors are set forth in the Brief for Petitioners (pp. 39-43). Nevertheless, the following statement is made in Respondents' brief (p. 29):

> "The trial court did not deny intervention as an exercise of its discretion; rather, intervention was denied because of the court's holding as to the statute of limitations. The Court of Appeals had no other question before it."

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[14] 49 F.R.D. 17, 21; A. 354; R. 356-57.

It is true that in the exercise of its discretion the court considered the issue of the statute of limitations. However, it is untrue that no other issue was considered by the trial court and it is likewise erroneous for Respondents to suggest that the issue of abuse of discretion was not before the Ninth Circuit. The issue was the subject of oral argument before the Ninth Circuit and Petitioners' brief before the Ninth Circuit argued the proposition that Respondents "Have No Basis for Appeal From the Denial of Permissive Intervention." Such brief also urged the proposition that "The District Court Did Not Abuse its Discretion." (See Appendix "A" hereto).

Petitioners' brief before the Court of Appeals also reflects the following language:

> "Applicants have no right to appeal from the denial of permissive intervention because they have failed to show that such denial constitutes an abuse of discretion. Applicants waited until their claims had become barred by the statute of limitations. To allow intervention at this late date would impose tremendous burdens on Appellees inasmuch as witnesses have died, memories have faded and record depositors have been discontinued."[15]

Based *inter alia* upon the foregoing arguments, the dissenting opinion of Judge Kilkenny stated as follows:

> "I believe the trial judge exercised a legal discretion and that the appellants, on the record before us, have not shown an abuse of his appraisal of the issues presented on the applications for intervention. I would affirm on the basis of

[15]The relevant pages of the Petitioners' brief before the Ninth Circuit are set forth in Appendix "A" hereto.

the trial judge's decision. *State of Utah v. American Pipe & Construction Co.*, 50 F.R.D. 99 (C.D. Cal. 1970)."[16]

Since the judgment of the Court of Appeals was not based on a showing of abuse of discretion, it is, therefore, in conflict with the decisions of this Court and with other circuits[17] as well as with the plain language of 24(b), F.R.Civ.P., *i.e.*, that discretionary decisions of the District Courts are to be reversed only upon a clear showing of abuse of discretion. Moreover, the whole issue of timely application by Respondents "must be answered * * * by exercise of the sound discretion of the trial court."[18] In the light of the history of the West Coast Pipe Cases (in which Respond-

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[16]Petition for a Writ of Certiorari, Appendix D, page 39.

[17]*Railroad Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 91 L.ed. 1646 (1947); *Kam Koon Wan v. E. E. Black, Ltd.*, 75 F.Supp. 553, 564 (D. Hawaii 1948); *See, FMC Corporation v. Keizer Equipment Company*, 433 F.2d 654, 656 (6th Cir. 1970); *Bumgarner v. Ute Tribe of Uintah and Ouray Res.*, 417 F.2d 1305, 1309 (10th Cir. 1969); *Edmondson v. State of Nebraska*, 383 F.2d 123, 127 (8th Cir. 1967); and *Stadin v. Union Electric Company*, 309 F.2d 912 (8th Cir. 1962). *Accord, Athas v. Day*, 161 F.Supp. 916-19 (D.Col. 1958); *cf. Hobbs v. Police Jury of Morehouse Parish*, 49 F.R.D. 176, 179-80 (W.D. La. 1970).

> "The trial court may take into account all the circumstances of the case, including any circumstances contributing to delay in the application for intervention. [Citing cases] * * * '[T]he most important factor' which should be considered by the trial cout 'is whether any delay in moving for intervention will prejudice the existing parties to the case.' 2 Barron & Holtzoff, *supra*, § 594, at 366." *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*, 420 F.2d 1103, 1115 (5th Cir. 1970).

United States v. Blue Chip Stamp Company, 272 F.Supp. 432, 435 (C.D. Calif. 1967); and *Basle Theatres, Inc. v. Warner Bros. Pictures Dist. Corp.*, 24 F.R.D. 476 (W.D. Pa. 1959).

[18]*Basle Theatres, Inc. v. Warner Bros. Pictures Dist. Corp.*, 24 F.R.D. 476 (W.D. Pa. 1959).

ents were members of a class who were invited to intervene), the decision of Judge Pence is within the doctrine, "the courts do not look with favor upon one who, fully aware of what has transpired, nonetheless fails to act on his rights and is unreasonably tardy in filing a petition for intervention."[19]

V.

Conclusion.

This Court should vacate the judgment of the Court of Appeals dated January 31, 1973, and should issue its mandate directing reinstatement of the aforesaid order of the District Court.

DOMINIC B. KING, Esq.,
and
MUSICK, PEELER & GARRETT,
JESSE R. O'MALLEY, Esq.,
LAWRENCE E. STICKNEY, Esq.,
Attorneys for Petitioner United States Steel Corporation.

THELEN, MARRIN, JOHNSON & BRIDGES,
GORDON JOHNSON, Esq.,
Attorneys for Petitioner Kaiser Steel Corporation.

PAUL, HASTINGS, JANOFSKY & WALKER,
OLIVER F. GREEN, JR., Esq.,
Attorneys for Petitioner U.S. Industries, Inc.

---

[19]*United States v. Blue Chip Stamp Company*, 272 F.Supp. 432, 436 (C.D. Cal. 1967).

SULLIVAN, JONES & ARCHER,
JAMES O. SULLIVAN, Esq.,
WAYNE M. PITLUCK, Esq.,
Attorneys for Petitioner American Pipe and Construction Co.

GIBSON, DUNN & CRUTCHER,
JOHN J. HANSON, Esq.,
ROBERT E. COOPER, Esq.,
Attorneys for Petitioners Smith-Scott Co., Inc. and United Concrete Pipe Company.

VANCOTT, BAGLEY, CORNWALL & MCCARTHY,
HALDOR T. BENSON, Esq.,
Attorneys for Petitioner Utah Concrete Pipe Company.

OLMSTEAD, STINE & CAMPBELL,
RICHARD W. CAMPBELL, Esq.,
and
RYLEY, CARLOCK & RALSTON,
READ CARLOCK, Esq.,
Attorneys for Petitioner W. R. White Company.

APPENDIX A.

BRIEF FOR APPELLEES [PETITIONERS HEREIN] IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

I. Applicants Have No Basis for Appeal From the Denial of Permissive Intervention Where Such Denial Is Based Upon the Exercise of Sound Discretion and Upon the Fact That Their Claims Are Barred by the Statute of Limitations.

Despite the suggestion of Applicants to the contrary, the District Court denied permissive intervention on *two* grounds: *first*, as a matter of discretion, because ". . . to permit even a limited intervention on the part of petitioners for the purpose of conducting joint discovery proceedings would in the context of this case, seriously prejudice the rights of the defendants, and unnecessarily complicate and delay resolution of discovery problems arising in Utah's case;"[82] and *second*, as required by statute, because to allow Applicants to avoid the bar of Section 5(b) by means of the Federal Rules of Civil Procedure would unlawfully abridge substantive rights of antitrust defendants.[83] Both grounds are consistent with the court's decision to allow intervention for purposes of asserting claims arising during the four-year period preceding the filing of the motions to intervene. Claims arising during that period would clearly not be barred by Section 5(b), and assertion of such claims would not prejudice the rights of defendants or delay resolution of Utah's case because it is almost certain that no viable claims could be asserted for that period—the evidence obtained in

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[82]R. 450; 50 F.R.D. at 102.

[83]R. 460; 50 F.R.D. at 108.

the West Coast Pipe Cases having indicated that the alleged conspiracy terminated long before that four-year period.[84]

Accordingly, in order to prevail on their appeal, Applicants must bear the unenviable burden of establishing that the District Court abused its discretion in denying intervention *and* that it was incorrect as a matter of law on its determination of the statute of limitations question.

(1) The District Court Did Not Abuse Its Discretion.

We have demonstrated above that the District Court exercised its discretion in denying permissive intervention. Accordingly, it is incumbent upon Applicants to establish that in denying intervention the District Court abused that discretion.

See,

Martin v. Kalvar Corporation, 411 F. 2d 552, 553 (5th Cir. 1969);

Edmondson v. State of Nebraska, 383 F. 2d 123, 127 (8th Cir. 1967);

Lipsett v. United States, 359 F. 2d 956, 959 (2d Cir. 1966); and

3B Moore, *Federal Practice*, ¶ 24.15, p. 24-562.

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[84]"For all antitrust (money) purposes, the only evidence so far developed in the massive prior litigation involving the same alleged conspiracies indicates with almost absolute certainty that any such conspiracies terminated at least by the end of 1962. Digging into all Sherman 1 claims for the four years immediately prior to May 13, 1969 would, therefore, to an equally almost absolute certainty, produce nothing but a dry and expensive hole for the petitioners, with no monetary recovery whatsoever. (The court here is not prejudging; it is prognosticating.) While the court cannot foreclose the petitioners from the questionable pleasure of digging such a hole, it will here bypass that segment of petitioners' allegations." R. 449; 50 F.R.D. at 101, n. 2.

Because Applicants contend that the District Court did not exercise its discretion, they have not offered any argument with respect to abuse. Several points made by Applicants do bear some relationship to that issue, however, and will be dealt with in that context.

In their Opening Brief, Applicants contend that the District Court placed them in a difficult position by denying both the class action and intervention. They assert that these decisions are inconsistent.[35] Initially, it should be pointed out that the District Court did not place Applicants in a "difficult position;" Applicants themselves created such difficult position by failing to file a complaint or to move to intervene until after their action was barred by the statute of limitations. Inasmuch as Applicants had many opportunities to join several previous class actions against Appellees, they cannot predicate a right to intervene at this late hour on their own dilatory conduct.[36] Additionally, it is abundantly clear that Applicants are incorrect in their assertion that the District Court contradicted itself in denying both the class action and intervention. Assuming *arguendo* that the class action decision and the intervention decision were in fact contradictory, Applicants' argument would necessarily question the validity of the class action decision as well as the intervention decision. The class action decision, however, is not open to attack. Having failed to take an appeal from the order respecting the class action, which order was entered on December 4, 1969 and is in all respects final,[37]

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[35]Appellants' Opening Brief, p. 10.

[36]R. 463; 50 F.R.D. at 109.

[37]See, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 93 L. Ed. 1528, 1536 (1949), and *Eisen v. Carlisle & Jacquelin*, 370 F. 2d 119, 120 (2d Cir. 1966).

and having entered into the Agreed Statement on Appeal which provides that "the question presented on appeal is 'Did the Court err in denying the aforesaid motion to intervene?'",[38] Applicants cannot now question that decision by alleging that either it or the intervention must be incorrect because both cannot be correct. To do so would constitute an improper collateral attack upon that decision.[39] Instead, they must establish that they clearly should have been allowed to intervene and that the District Court's decision to the contrary is such egregious error as to constitute abuse of discretion. They have not even attempted to make such a showing.

The foregoing notwithstanding, the class action and intervention decisions are not inconsistent. In ordering that Utah's action not be maintained as a class action, the District Court found that Utah had not described a class, that the actual number of potential claimants was not so large as to warrant maintenance of a class action and that a class action was not superior to other available methods for trying the case.[40] On the other hand, the District Court's denial of intervention was based on the fact that intervention "would in the context of this case, seriously prejudice the rights of the defendants, and necessarily complicate and delay resolution of discovery problems arising in Utah's case."[41] Applicants seem to suggest that the District Court contradicted itself and based its prediction of prejudice and delay on the fact that Applicants were so numer-

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[38]Paragraph 15 of the Agreed Statement on Appeal, R. 6. See also, Applicants' Opening Brief, p. 2 (Statement of Issues).

[39]Fed. R. App. P., Rule 4.

[40]R. 346-347 [Ex. I].

[41]R. 451; 50 F.R.D. at 102.

ous that their joinder would render administration of the law suit difficult or impossible. Such is clearly not the case. The District Court did not deny intervention altogether. It was willing to permit intervention for the purpose of asserting claims relating to the four-year period preceding the filing of the applications to intervene. The District Court's findings of fact demonstrate conclusively that it refused to allow the assertion of claims relating to an earlier period because Appellees would be prejudiced by the unjustified dilatory conduct of Applicants in waiting until after the statute of limitations had run on those claims before bringing any action.[42] Those findings make it quite clear that such prejudice was wholly unrelated to the number of would-be intervenors and would have resulted from the intervention of any one of them. Moreover, inasmuch as "defendants as well as plaintiffs have equal rights to 'fairness and due process' "[43] and inasmuch as Appellees have already been harmed badly by the decision in *Maricopa County v. American Pipe and Construction Co.*,[44] which extended substantially the tolling provisions of Section 5(b), the District Court could not, consistent with fairness, allow Applicants to intervene and relate their claims back to a time prior to the running of the statute of limitations. It is well settled that where prejudice would accrue to defendants by reason of the motion to intervene, it must be denied, particularly where there are compelling equities in favor of defendants and against plaintiffs.

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[42]R. 444 [Ex. M].
[43]R. 463; 50 F.R.D. at 109
[44]303 F. Supp. 77, 87 (D. Ariz. 1969).

See,

Stickler Eng'r Corp. v. Michael Flynn Mfg. Co., 23 F.R.D. 12 (E.D. Pa. 1958);

Kimberly Knitwear v. Hall, 20 F.R.D. 145 (S.D.N.Y. 1957); and

United States v. Loew's Inc., 20 F.R.D. 423 (S.D.N.Y. 1957).

Applicants have shown nothing to indicate abuse of discretion on the part of the District Court. Therefore, in light of the leeway traditionally afforded trial courts in dealing with permissive intervention and in light of the special insight into the West Coast Pipe Cases gained by Judge Pence in administering such cases, the denial of permissive intervention should be upheld as a proper exercise of discretion.

(Brief for Appellees, pages 13-18).

IV.

Conclusion.

It is apparent that the District Court's decision denying intervention as a matter of right pursuant to Rule 24(a)(2) and permissive intervention pursuant to Rule 24(b)(2) was wholly correct. Applicants have no interest in the subject matter of the instant litigation which would justify their intervention, and their applications were not timely, having been filed after Applicants' claims were barred by the statute of limitations. Accordingly, Applicants have not and cannot meet the requirements of Rule 24(a)(2).

Applicants have no right to appeal from the denial of permissive intervention because they have failed to show that such denial constitutes an abuse of discre-

tion. Applicants waited until their claims had become barred by the statute of limitations. To allow intervention at this late date would impose tremendous burdens on Appellees inasmuch as witnesses have died, memories have faded and record depositors have been discontinued. Applicants cannot intervene to assert claims that are barred by the statute of limitations. The mandatory time limit set by Section 5(b) cannot be extended by any procedural device such as a class action allegation. Moreover, even the erroneous vicarious filing rationale which has been asserted in connection with the filing of class actions is not available to Applicants here. No valid class action was filed therein; so no vicarious filing can have taken place.

Accordingly, the decision below must be affirmed.

(Brief for Appellees, pages 32-33).